Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1997

EDWARD W. BOWLIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The Circuit Court For The Tenth Judicial Circuit, Florida

PETITION FOR A WRIT OF CERTIORARI

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25 pp

QUESTIONS PRESENTED

The Florida Constitution (*as revised in 1968*) removed the State Attorney from the executive branch and placed it in the judicial branch, at Article V §17. Under Florida's current Constitution, a single body (the judicial branch) is simultaneously the adversary and the decision maker in criminal prosecutions.

The question presented is:

DOES A CRIMINAL PROCEDURE WHICH COMBINES THE STATE TRIAL JUDGES AND THE STATE PROSECUTORS IN A SINGLE BODY, WHICH EXERCISES THE WHOLE POWER TO PROSECUTE AND ADJUDICATE, VIOLATE THE FOURTEENTH AMENDMENT'S DUE PROCESS MAXIM "THERE IS NO LIBERTY, IF THE POWER OF JUDGING BE NOT SEPARATED FROM THE LEGISLATIVE AND EXECUTIVE POWERS"?

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INTRODUCTION

Edward W. Bowlin III, respectfully petitions for a writ of certiorari to review the judgment of the Circuit Court for the Tenth Judicial Circuit, Florida.

OPINIONS BELOW

The opinion of the trial court (App., *infra*, p.A6) is unpublished. The opinion of the circuit court (App., *infra*, p.A4) is unpublished. The corrected opinion of the circuit court (App., *infra*, p.A2) is unpublished. The Second District Court's denial of certiorari (App., *infra*, p.A1) is published at 696 So. 2d 358.

JURISDICTION

The judgment of the Circuit Court for the Tenth Judicial Circuit, Florida, was entered on April 15, 1997. (App., *infra*, p.A1) The Second District Court of Appeals, Florida, denied a timely filed petition for a writ of certiorari on June 6, 1997 (App., *infra*, p.A8). Since, the Second District Court denied certiorari and the Florida Supreme Court lacks jurisdiction to review the case, review was sought by the highest state court having jurisdiction over the case and therefore, the judgment of the Circuit Court is reviewable by this Court. *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967).

On July 16, 1997, Justice Kennedy signed an order extending the time for filing this petition for certiorari to and including October 6, 1997. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

A. How the Federal Question Was Presented

Bowlin was charged with two criminal traffic misdemeanors. At Bowlin's arraignment he filed a timely and authorized Motion to Dismiss alleging that Florida's criminal procedure violated the Fourteenth Amendments "due process" clause *in that* the Judicial branch is both the adversary and adjudicator, and thereby violated the first maxim of due process, "there is no liberty, if the power of the judging be not separated from the legislative and executive powers." (App. p.A2).

The trial court denied Bowlin's Motion to Dismiss, ruling that the two institutions are significantly separate to avoid the sort of collusion and conflict of interest depicted in the Defendant's Motion to Dismiss. (App. p.A6). Bowlin then entered a plea of no contest specifically reserving the right to appeal the denial of his motion to dismiss pursuant to *Brown v. State,* 376 So. 2d 382 (Fla. 1997). (App. p.A2).

Bowlin filed a timely and authorized Notice of Appeal to the circuit court of the tenth judicial circuit. Bowlin argued that his prosecution violated the Fourteenth Amendment's "due

process" clause *in that* the judicial branch is both the adversary and adjudicator. The circuit court affirmed the trial courts decision (App. p.A2).

Bowlin then filed a timely and authorized Petition for Writ of Certiorari to the Second District Court of Appeal, Florida. The district court denied Bowlin's petition for Writ of Certiorari. (App. p.A1).

B. Proceedings in the County Court

On August 14, 1995, Bowlin argued a motion to dismiss before Judge Michael E. Raiden. Judge Raiden denied Bowlin's motion and Bowlin then entered a plea of *nolo contendere* and was given specific leave to appeal the denial of his motion to dismiss (App. p.A6).

C. Proceedings in the Circuit Court

On September 11, 1995, Bowlin timely filed a notice of appeal with the Circuit Court. Bowlin argued that the trial judge erred in denying Bowlin's motion to dismiss. This point was based on the argument that the Fourteenth Amendment establishes that "...nor shall any State deprive any person of life, liberty, or property, without due process of law..." and that when the judicial branch of government both prosecutes and adjudicates the same cause of action, it is a denial of that "due process".

On April 15, 1997, the Circuit Court issued its order affirming the trial court (App. p.A2).

D. Proceedings in the District Court of Appeal

In May, 1997, Bowlin filed a timely and authorized Petition for Writ of Certiorari in the Second District Court of Appeal, Florida. On June 6, 1997, the District Court of Appeal denied Bowlin's petition for Writ of Certiorari (App. p.A.).

REASONS FOR GRANTING THE PETITION

The issue of whether the first maxim of due process "there is no liberty, if the power of the judging be not separated from the legislative and executive powers." is applicable to the states criminal process, or whether a single body may exercise the whole power to prosecute and adjudicate criminal actions, is a serious legal Fourteenth Amendment question which affects the public interest and which has not been, but should be, settled by this Court.

I. THE CIRCUIT COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER THAT ARTICLE V, §17, OF THE FLORIDA CONSTITUTION, IS NOT UNCONSTITUTIONAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Justice Story, Justice Cooley, Justice Blackstone, Mr. James Madison, Mr. John Adams, Mr. Thomas Jefferson, and many other notable jurists and statesmen have stated, quoted, and concurred with Mr. Montesquieu's maxim "There

can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates" or "there is no liberty, if the power of judging be not separated from the legislative and executive powers."

In *Pennoyer v. Neff*, 95 U.S. 733 this Court stated "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights" and Justice Cooley stated that "Due process of law in each particular case means, such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." *Cooley, Const. Lim.* ch. 11.

The maxim "there is no liberty, if the power of judging be not separated from the legislative and executive powers" was a fundamental practice in England before the revolution, which was incorporated in the Constitution of the United States and obviously was not a rejected principle after the settlement of our independence. It is a due process requirement, which states must adhere to in their criminal process pursuant to the Fourteenth Amendment.

In discussing this principle Dr. Paley has stated that, because of the psychological tendencies and human weaknesses, the combining of prosecutorial and adjudicative functions will lead to biased adjudications, pre-judgments, and tyranny. Therefore the practice must be forbidden in order that the guarantee of due process is to be implemented. In discussing this maxim, Dr. Paley not only states that this is a maxim of a free state,

but declares it to be "The first maxim of a free state." *Paley's Moral Philosophy*, B. 6, ch. 8.

History has confirmed Dr. Paley's assertions by showing us that the combining of these functions has always lead to biased adjudications, pre-judgments, and tyranny. Justice Blackstone has also shown that the combination of such functions leads to tyrannical courts, such as the court of star-chamber, which was abolished by statute of *16 Car. I, c. 10* (Star-Chamber, 1640).

In discussing tribunals which did not employ this maxim, Justice Cooley stated, "But there were two tribunals [The Court of Star Chamber and The Court of High Commission] unknown to the common law, but exercising a most fearful authority, against whose abuse it was not easy for the most upright and conscientious judge in all cases to afford relief." *Cooley, Const. Lim.* ch. 10. Justice Cooley shows us from history that where a system is void of this maxim, even upright and conscientious judges can not always afford relief. Justice Cooley goes on to declare, "It is evident that while those tribunals existed there could be no effectual security to liberty." *supra.*

In all instances, where life, liberty, or property is at stake, the states must adhere to the previously declared rules for adjudicating the claim, or at least, not deviate from them in a manner which is unfair to the individual against whom the action is to be taken.

Because of psychological tendencies and human weaknesses, the criminal trial process must include this safe-guard which prevents arbitrary actions and is essential to insure a fair adjudicatory process. Florida's criminal procedure fails to institute this required procedural safe-guard, which is necessary for

fundamental fairness when one's life, liberty or property may be impaired.

Whereas in Florida the Judicial branch both prosecutes and adjudicates all criminal actions, history has shown us that the psychological tendencies and human weaknesses in conferring both adversarial and adjudicative powers in one branch poses an actual risk of bias or pre-judgment and that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

While this court has stated that the states may distribute its powers as it sees fit, it also stated that "...provided it acts consistently with due process." *Crowell v. Benson*, 285 U.S. 22, 76 L. Ed. 598, 52 S.Ct. 285. Florida's Constitutional provision combining the whole prosecutorial and adjudicative powers in criminal prosecutions is not consistent with due process.

Under Florida's current criminal process, the judicial branch (1) decides which cases to prosecute, (2) conducts the factual investigation, (3) prosecutes, (4) introduces the evidence, (5) determines the admissibility of the evidence, (6) adjudicates, (7) and sentences. The Judiciary exercises the whole power of enforcing, investigating, and adjudicating criminal actions, without the safe-guard against arbitrary actions of those in power. Therefore, Florida's criminal process lacks a neutral and detached decision-maker and an independent position of the advocate *in that* the decision-maker and the advocate are one and the same.

Justice Cooley stated, "it is a maxim in political science that, in order to the due recognition and protection of rights, the powers of government must be classified according to their

nature, and each class intrusted for exercise to a different department of the government. This arrangement gives each department a certain independence, which operates as a restraint upon such action of the other as might encroach on rights and liberties of the people, and makes it possible to establish and enforce guaranties against attempts at tyranny," *Cooley, Const. Lim*, ch. 3, and that "When all the powers of sovereignty are exercised by a single person or body, who alone makes laws, determines complaints of their violation, and attends to their execution, the question of a classification of powers can have only a theoretical importance, for the obvious reason that nothing can depend upon it, which can have practical influence upon the happiness and welfare of the people." *Cooley, Prin. Const. Law.* ch. 3.

It is the procedure which exercises the independence of the judiciary that the people must be able to rely on for the protection of their liberty, and not only on the integrity and honesty of the judges who try their cases. "The independence of the law, of which the independence of the judiciary forms a part, is one of the main stays of civil liberty." *Lieber, Civil Liberty and Self-Government.*

The Florida Constitution was amended placing the State Attorney's office in the judicial branch. While the people of a state may amend their Constitution they must retain the principles which ensure fundamental fairness in the criminal trial process.

"The Formation and Amendment of State Constitutions."

> "Certain things are to be looked for in all these instruments;"
> "3. Those declaratory of the principles which ensure to the citizen an impartial trial, and protect him in his life, liberty, and property against the arbitrary action of those in authority:"
>
> *Cooley, Const. Lim.* ch. 3.

The Missouri Supreme Court has also stated that a state cannot deprive a person of his property without due process of law through the medium of a constitutional convention any more than it can through an act of the legislature. *Clark v. Mitchell*, 69 Mo. 627

The maxim "there is no liberty, if the power of judging be not separated from the legislative and executive powers." is an essential requirement of the due process maxim of a "neutral and detached decision maker." History has shown that this maxim is imperative and if the procedure does not include the former maxim it is impossible to guarantee the latter.

Since Florida's Criminal procedure implements a system where the judicial branch exercises the whole power, which simultaneously prosecutes and adjudicates the same cause of action, it is void of the due process requirement of a neutral and detached decision maker. Petitioner contends that the circuit court erred in affirming the trial court's order that Article V, §17, of the Florida Constitution, is not unconstitutional in violation of the Fourteenth Amendment to the United States Constitution.

II. THE QUESTION PRESENTED IS IMPORTANT

The maxim "there is no liberty, if the power of the judging be not separated from the legislative and executive powers." is the first and most important procedural due process maxim in protecting liberty.

The due process requirement of the "independence of the judiciary" is to prevent arbitrary actions of judges. Justice Blackstone stated that if the judiciary is joined with the executive "...as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing, therefore, is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state."

Mr. Roscoe Pound stated that "(The prosecutor) has the function of deciding... whether any criminal proceedings be brought ... The chief... prosecutor should be primarily an executive official, qualified by the kind of capacity and experience which makes an efficient executive of a large and important organization." *Roscoe Pound and Felix Frankfurter,* 1922. It seems clear that the prosecutor should be an executive officer and not judicial.

Florida's criminal procedure is distinguishable from that of a mayor of a village with inferior judicial functions as noted by this Court in *Tumey v. State of Ohio,* 47 S.Ct. 437, 273 U.S. 510, 71 L.Ed. 749. Under Florida's criminal procedure the judiciary, a state agency, prosecutes and adjudicates all criminal offenses from second degree misdemeanors to first degree felonies and imposes punishments from small fines to the death penalty.

Florida's criminal procedure effects thousands of citizens every year and has the potential of effecting millions of Floridians and all who may cross, clear, or unwittingly enter the borders of this state.

This is a case where Florida's judiciary simultaneously exercises the whole prosecutorial and adjudicative powers in criminal prosecutions. The question of whether a criminal procedure, where the judiciary simultaneously exercises the whole power to prosecute and adjudicate criminal actions is a violation of due process is an issue which has not been, but should be, settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.